TIM K. SMITH

171 IBLA 135 Decided February 27, 2007

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Appeal from decision of the Three River (Oregon) Resource Area Office, Bureau of Land Management, denying mining plan of operations. OR 52796.

Affirmed.

1. Materials Act--Mining Claims: Generally--Mining Claims: Common Varieties of Mineral

Section 1 of the Materials Act of 1947, as amended, 30 U.S.C. §§ 601 through 615 (2000), and 43 CFR 3603.10 authorize BLM to make "mineral material sales * * * under permit * * * from" mineral deposits it designates for that purpose as "community pit sites." The regulations expressly state that "BLM's designation of a community pit site, when noted on the appropriate BLM records or posted on the ground, establishes a right to remove the material superior to any subsequent claim or entry of the lands." 43 CFR 3603.11. Where BLM has designated a deposit of building stone as a community pit and noted that designation on its records, a mining claim located after the designation creates no right to remove the material, and BLM properly rejects a mining plan of operations proposing to do so.

APPEARANCES: Tim K. Smith, Hines, Oregon, pro se; James Buchanan, Acting Manager, Three Rivers (Oregon) Resource Area Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Tim K. Smith has appealed the June 17, 2004, decision of the Three Rivers (Oregon) Resource Area Field Manager, Bureau of Land Management (BLM), denying his mine plan of operation.

Smith is the co-locator of six mining claims, the Flatstone Nos. 1 through 6 placer claims (ORMC-158604 through -09) located on December 16, 2003, with notice of recordation filed with BLM on February 2, 2004. [1/] On May 24, 2004, Smith filed his Intent with the Burns (Oregon) District Office, BLM, referring to a "decorative rock deposit" in the claimed area (Intent at 1) and noting a "conflicting use" of the claimed lands, namely that BLM "has pursued a status for a portion of this deposit as a community pit." It appears from the description accompanying the Intent that Flatstone Nos. 2, 3, and 6 conflict with the Pine Creek Decorative Stone Community Pit, discussed in detail below. Id. at 2. In the Intent, Smith challenged the legal basis for the designation of the community pit as "inappropriate due to the obvious qualification for this deposit as an uncommon material and therefore

[1/] Flatstone Nos. 1 through 3 are situated, respectively, in NW¼, SW¼, and SE¼, Sec. 35, T. 20 S., R. 33½ E., Flatstone No. 4 in NE¼ Sec. 3, T. 21 S., R. 33 E., Flatstone No. 5 in NW¼ Sec. 2, T. 21 S., R. 33 E., and Flatstone 6 in NE¼ Sec. 2, T. 21 S., R. 33 E., all in relation to the Willamette Meridian (W.M.). (Map attached to Addendum and Correction to Intent to Conduct Small Mining Operation, filed June 9, 2004.)

Smith stated in his "Intent to Conduct Small Mining Operation" (Intent) filed with BLM on May 24, 2004, that the claims "are all 160-acre association placer claims." The Intent notes that the "operation will be conducted by Malheur Flatstone LLC. (in organization)" and refers to eight "principals of Malheur Flatstone," Livina Joyce Cronin, Patrick C. Cronin, Bobbi Jo Heany, Bryan W. Heany, Gay Cronin, Joe Cronin, Tim K. Smith, and Holly J. Smith. From this, we presume that the 160-acre claims were located by these eight persons, in accordance with the 20-acre maximum per person allowed under 30 U.S.C. §§ 35-36 (2000) and 43 CFR 3842.1-2.

On June 10, 2004, BLM issued a decision holding the "Fla[t]stone 4–6 (ORMC 158607-ORMC 158609)" for rejection because they exceeded 160 acres. That appears to be because Sec. 2 and Sec. 3 are irregular and contain much more than 160 acres, owing to the presence in each of two extra lots. As a result, the NE¼ of Sec. 3 (Flatstone No. 4) contains six lots totaling 218.25 acres, the NW¼ of Sec. 2 (Flatstone No. 5) contains six lots totaling 218.47 acres, and the NE¼ of Sec. 2 (Flatstone No. 6) contains six lots totaling 219.57 acres. Locating the Flatstone Nos. 4 through 6 claims by reference to those aliquot parts resulted in the claims exceeding 160 acres. BLM's June 2004 decision also stated that "[a]mended location notices are required to correct the deficiency." The record does not reveal whether amended locations were filed.

locatable as opposed to a 'common variety' mineral deposit under" 43 CFR Subpart 3711. Citing the definition of a "locatable mineral" at 43 CFR 3812.1, he asserted that "the deposit herein claimed satisfies the entire criterion listed to qualify as a deposit of an uncommon variety" and that "the deposit status as a community pit which is pending should be rejected as inappropriate and in conflict with the intent of Federal mining laws." Id. at 2. Smith presented no substantial evidence in support of that assertion.

BLM's record contains some documentation concerning the designation of the community pit Smith referred to in his Intent. In 1993 a party expressed interest in "small facing stone" at the "Pine Creek Building Stone Site" for "sale in the Bay Area." (BLM Conversation Record dated July 14, 1993.) In August 1993, BLM granted clearance to continue with a community pit designation after it inspected the area and determined that excavation of decorative flat rock would not adversely impact threatened, endangered, or sensitive plants or their critical habitat. (Botanical Clearance Report dated Aug. 19, 1993.) However, at the same time, BLM recommended that sales of decorative rock from the area be limited to personal use, with no sales for commercial use, because of the desirability of preserving the primitive character of the surrounding area for recreational use. (Memorandum from T. M. Geisler dated Aug. 21, 1993.) It appears that BLM so notified the party interested in securing sales of the stone in October 1993.

BLM subsequently continued to consider whether to allow noncommercial sale of small volumes of the flat rock in the area. (NEPA Categorical Exclusion Review form dated Feb. 2, 1994.) A policy favoring that action was reported in BLM's March 1994 Burns District Planning Update. In August 1994, BLM was advising the public that it had decided not to sell rock in that area to commercial users. (BLM Conversation Record dated Aug. 1, 1994.) About that time, BLM began to consider opening the area as a community pit, where the rock would be sold in small volumes to the public at large.

On May 10, 1996, BLM's Burns (Oregon) District Manager advised the Oregon State Director, BLM, as follows: "We have designated the following sites as community pits. Please assign a serial number to each case and note the designations on the master title plats and land status records." The "Pine Creek Decorative Stone Community Pit" is listed, covering approximately 460 acres described as S½ Sec. 35, T. 20 S., R. 33½ E., W.M, and Lot 5 Sec. 1 and Lots 1, 2, and 8 Sec. 2, T. 21 S., R. 33 E., W.M. There is little in the record concerning the District Office's process leading to the designation of the pit. A copy of a serial register page dated May 16, 1996, indicates that BLM assigned serial number OROR 52796 to the "Pine Creek Dec Stone" community pit.

There is a copy of the serial register page concerning community pit OROR 52796 listing a history of "produced cubic yards" and "produced value" from May 1999 through May 2004. It also contains a list of names, presumably of the purchasers of the stone. The record is otherwise silent until April 2004, following the location of Smith's claims, at which point BLM provided him with copies of the amended regulations at 43 CFR Subpart 3603, as well as regulations at 43 CFR 3711.1, concerning common varieties of minerals, and 43 CFR 3809.101, concerning initiation of operations for minerals that may be common variety. BLM also provided information concerning the legal definition of a common variety.

As noted above, Smith filed his Intent with BLM on May 24, 2004. He stated in a cover letter that he had been advised by a BLM employee that "a portion of this area has been recommended (requested) for a community pit for 'dimension stone'" and that "the status of the request is still pending." He stated as follows concerning his position as to the locatability of the stone:

> It is our contention that the area of our claims and that of the requested community pit contains unique and valuable decorative rock that clearly fits the definition of a locatable mineral deposit. Our investigation has shown the retail price of similar or inferior rock in the metropolitan areas of California, Washington, Oregon runs as high as $.20 to $.24 per pound. While there is rock of similar type throughout the west in discrete small locations, none that I have seen in my 34 years of geologic work is as desirable in color and uniformity nor as consistent and plentiful in aerial extent as this deposit. The quality of this rock was witnessed by the highly positive reaction of the various rock wholesalers and retailers who were shown samples of the rock compared to their inventory of similar use rock on their lots.
>
> We respect the effort to supply the local residents with a source of this rock but believe the "community pit" designation is in conflict with the United States mining laws and places the Federal government in competition with a locatable mineral resource. Our intent is to begin on the portions of our claims not in conflict with the pending classification. We do request, until this issue is resolved, that no sales of rock from the conflicted ground are made.

(Cover Letter to Intent, filed May 24, 2004, at 1.) Again, he presents no substantial evidence in support of this contention.

On June 17, 2004, BLM issued its Decision Letter in this matter. BLM advised Smith that the Pine Creek Decorative Stone Community Pit had been designated on May 10, 1996, correcting the statement in appellant's cover letter to the Intent that

approval of the the designation was still pending before BLM. (BLM Decision Letter dated June 17, 2004 (Decision Letter) at 1.) BLM concluded that it would "continue to sell flat rock from the community pit because BLM has a superior right where a community pit predates a mining claim location." Id. at 3.

BLM also ruled that "[i]t is in conflict with the mining laws to mine common variety minerals under mining law regulations." Id. at 3. Noting that Smith could "provide BLM with a mine plan of operations for mining on claims outside of the community pit," BLM noted that, "[u]pon receipt of a complete plan of operations," presumably for mining materials outside the pit, it would "request a common/ uncommon variety determination on those claims by a certified mineral examiner." BLM allowed that it would "process that plan of operations," presumably allowing mining if appropriate, "for the interim until the mineral examination report is completed subject to [Smith's] depositing into an escrow account the appraised value of the flat rock that [he] would remove pending the outcome of the common/ uncommon variety determination." Id. at 4. Smith appealed.

[1] Section 1 of the Materials Act of 1947, as amended, 30 U.S.C. §§ 601 through 615 (2000), and 43 CFR 3603.10 authorize BLM to make "mineral material sales * * * under permit * * * from" mineral deposits it designates for that purpose as "community pit sites." [2/] In other words, BLM is authorized to establish community pits on common variety mineral deposits and sell the material to the general public. [3/] The regulations expressly state that "BLM's designation of a community pit site, when noted on the appropriate BLM records or posted on the ground, establishes a right to remove the material superior to any subsequent claim or entry of the lands." [4/] 43 CFR 3603.11.

The effect of the designation of the mineral deposit as a "community pit" was controlling in Robert L. Mendenhall, 127 IBLA 73 (1993) (appeal dismissed with prejudice, No. CV-S-93-912 LDG-LRL (D. Nev. Sept. 17, 1993)), where one of the mining claims was located for assertedly uncommon-variety building stone on lands BLM had previously designated as a community pit under the previous regulation, 43 CFR 3604.1 (2001), with BLM duly noting the community pit designation on the

[2/] That authority was previously set out at 43 CFR 3604.1 (2001), which contains substantially similar language.
[3/] The regulation also authorizes BLM to establish "common use areas" where the general public may make "free use" of the materials.
[4/] That provision was previously set out at 43 CFR 3604.1(b) (2001), which provided that "[t]he designation of a community pit site constitutes a superior right to remove the material as against any subsequent claim or entry of the lands."

relevant Master Title Plat (MTP) prior to the location of the claim. [5/] We held in that case that, in accordance with 43 CFR 3604.1(b) (2001), the community pit "designation constituted a 'superior right' to remove the material over that [right] afforded the claimants under their mineral location" (127 IBLA at 77); that "[a]ny rights arising" from the mining claim filed subsequent to the designation of the community pit are "clearly subordinate to the designation of the lands as" a community pit; and that BLM "properly rejected the proposed plan of operations to the extent it included the land embraced by the" mining claim. 127 IBLA at 85. That holding was confirmed in Mid-Continent Resources, Inc., 148 IBLA 370, 379 (1999) ("BLM properly may preclude a mining claimant from conducting mining operations within the area of the pit until the pit designation is terminated"); Cambrillic Natural Stone, 161 IBLA 306 (BLM correctly maintained that, "pursuant to 43 CFR 3604.1(b) (2000), where the community pit pre-dates a mining claim location, BLM has a superior right"); and Cambrillic Natural Stone (On Reconsideration), 165 IBLA 140, 146-47 (2005) ("An after-located mining claim is subordinate to a pit designation, and it is for BLM to decide whether to approve mining operations prior to the termination of the pit designation."). 165 IBLA at 149.

As noted above, on December 24, 2001, 43 CFR 3604.1(b) (2001) was superseded by 43 CFR 3603.11, specifically governing community pits:

> **§ 3603.11 What rights pertain to users of community pits?**
>
> BLM's designation of a community pit site, when noted on the appropriate BLM records or posted on the ground, establishes a right to remove the material superior to any subsequent claim or entry on the land.

Thus, the new regulation continues to provide that, where a community pit has been established, a right to remove the material is created that is superior to any subsequent claim or entry, including mining claims, adding the proviso (apparently added to follow our decision in Robert L. Mendenhall, supra) that the creation of the superior right required notation of the community pit designation on the public land records.

We are aware that, in our decisions in Cambrillic Natural Stone, supra, we remanded the matter for BLM to determine whether the material was a common or uncommon variety even though some of the mining claims involved in that case were located after the date the community pit was established for the same mineral material as was being sold in the community pit. Cambrillic Natural Stone (On

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[5/] Appellants in that case unsuccessfully attempted to show that they held rights in the mining claim predating the designation of the community pit. Robert L. Mendenhall, 127 IBLA at 77-85.

Reconsideration), 165 IBLA at 149-50. As noted in our decision on reconsideration, Cambrillic was a rare case, where the dispute regarding whether the mineral could be disposed of by sale or was instead locatable long pre-dated the pit designation, the record contained no reliable basis for deciding that dispute, and the mining claimant had submitted independent evidence for BLM's consideration that the material was an uncommon variety and therefore locatable. Cambrillic Natural Stone (On Reconsideration), 165 IBLA at 149.

We find no such indication of longstanding uncertainty about the nature of the stone at issue. Further, we cautioned in Cambrillic Natural Stone (On Reconsideration) that "more than an unsubstantiated or superficial assertion is necessary to challenge the implicit conclusion that the mineral within a sale tract of a designated community pit is a common variety." 165 IBLA at 149. In Cambrillic, the evidence presented by the mining claimant "viewed against the backdrop of the evidence in the administrative record, clearly crosse[d] the threshold, such that BLM should decide the question before allowing the" sale of the material from the pit to continue. Id. In the present case, appellant has not made such a showing.

BLM correctly held in the decision under appeal that it could continue to sell flat rock from the community pit because it has a superior right, since the community pit designation, which was duly posted on BLM's public land records, predated the location of Smith's mining claims. [6/]

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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David L. Hughes
Administrative Judge

I concur:

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Christina S. Kalavritinos
Administrative Judge

[6/] Although it has not been challenged on appeal, we note that BLM properly opened the door to the possibility that Smith might be able to mine material outside the community pit area while its mineral character of that material is being determined, provided that he paid the sale price of the material into an escrow account. Our view of the proper procedure for BLM to follow in these circumstances is set out in Jesse R. Collins, 145 IBLA 199, 204 (1998).